

COURSE 12, TUTORIAL 3

DEVELOPING A THREE STEP STRATEGY FOR COMPLIANCE

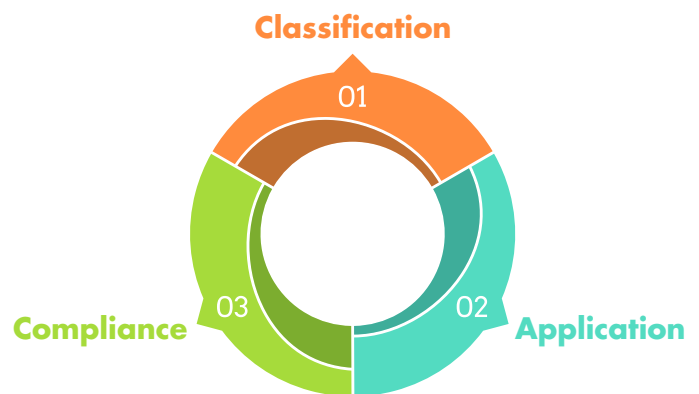


Let's say your company's regulated under ITAR, what's your strategy for dealing with this? What's your game plan for complying? I recommend a three-prong strategy for complying with ITAR: classification, application, compliance program.

THREE STEP STRATEGY

Classification simply means you need to determine if your product is on the Munitions List and subject to ITAR. This is sometimes referred to as determining the "export jurisdiction and classification" of your product. Remember in the beginning, I said, "If your product is on the Munitions List, you're subject to these controls." Well, if you don't check to see if you're on the list, how are you going to know if you're subject to these controls? So, the first step is to review the Munitions List to see if your product or service is covered on the list. At this stage, companies also check to see if their products are listed on the Commerce Control List (CCL) under the Export Administration Regulations. I'm going to talk about this in a few minutes.

The second strategy is **application**. This simply means, if you need a license for something, apply for it. Submit the application and obtain the license. Some people think, "If my product is subject to ITAR, I'm not allowed to export it. I can't deal with foreign companies at all." That's not true. In fact, nothing's further from the truth. If your item is subject to these controls, you can still do overseas business in many instances. You simply need to get a license or a Technical Assistance Agreement





(TAA) and follow the terms of the license. While the State Department does restrict certain products going to certain countries, a large number of transactions are definitely approved. There are many companies that do robust international business even if their products are ITAR-controlled. In dealing with overseas companies, you just have to apply for the right license authorization and follow the other ITAR requirements.

The third strategy here is **Compliance Program**. A compliance program is a management system in your company for compliance with these laws. Now, you've attended this training, so you have an understanding of the law, but how do you get all the other people in your company to understand these requirements? Well, that's where this compliance program comes in. Under a compliance program, you appoint a person in your company to be in charge of export compliance, the compliance administrator, and it's that person's job to come up to speed on these regulations. You adopt written policies and procedures for what to do in different situations: for export transactions; for obtaining TAAs; dealing with foreign nationals, foreign employees; managing files in your computer system that contain ITAR technical data - "Are we creating data in our computer system that contains ITAR technical data?" You provide training to your employees so they understand what is expected of them. Because these laws are so complex you really need to have some sort of a compliance mechanism in place.

EXPORT ADMINISTRATION REGULATIONS (EAR)

In the beginning of my presentation I said there was a second area of export controls - the Export Administration Regulations. I want to describe how these fit together with ITAR. The EAR are the export laws administered by the Commerce Department. The purpose of these laws is to control products that are commercial in nature - but are somehow useful in some military application. Why, you will ask, do you have two separate sets of laws that deal with the same thing? Well, I'll spare you the boring political history - but just accept that there's two sets of regulations, two agencies, for these categories of products. One is military, one is commercial. A good example of a commercial item regulated under the EAR is something called a **triggered spark gap**. A triggered spark gap is a medical device that hospitals use for blasting kidney stones. It's a very small instrument that has a very hot tip, and it actually destroys the kidney stone in the body. Well, it just so happens that triggered spark gaps can also be used to detonate a nuclear device. There were concerns by the U.S. government that a rogue nation could use this device to detonate a nuclear weapon, so they put the item under export controls under the EAR. This is a true story. There was actually an export case on triggered spark gaps. Now, this is not a military product, it wasn't developed for military use, no military funding. It was developed for use in the healthcare field, so it is NOT regulated under ITAR. But it still can be useful for military and defense, so it's subject to the EAR.



The triggered spark gap was designed for treating kidney stones. However, because it also has a military application, it is on the CCL



COMMERCE CONTROL LIST

The principles under the Export Administration Regulations are very similar to ITAR. The EAR also has a list of controlled products called the **Commerce Control List**. If your product is on the Commerce Control List, it may require an export license – depending on the country to which it's going to be shipped and other factors. When you're classifying your product, you should follow a certain procedure. You should look first to see if the item is on the U.S. Munitions List, and subject to ITAR. ITAR is considered the higher level of control. If it's subject to ITAR, you then follow the rules under ITAR. If it's not on the Munitions List and not subject to ITAR, then you look to see if it's on the Commerce Control List, and subject to requirements under the Export Administration Regulations – if so, you then follow the EAR. This is an important procedure, and you have to start with ITAR first. You don't want to reverse it. Start with ITAR first and then review the EAR. As I mentioned, if your product is on the Commerce Control List you may require an export license to export it depending on the country to which it is going and other factors. In addition, the EAR applies not just to physical products but also software and technology as well, just like under ITAR. So there are controls on the technical drawings, the specifications, the operating manuals, and the formulas. If technology and software are subject to controls you cannot export them without a license and you cannot disclose them to foreign nationals in the U.S. without a license. The EAR also has certain requirements for all export transactions, even if the item is not on the Commerce Control List. There are restrictions on exporting to certain restricted countries such as Iran and Syria; to certain prohibited parties on the U.S. prohibited parties lists; and for certain prohibited end uses.

Commerce Control List Categories

0 Nuclear & Miscellaneous

1 Materials, Chemicals, Microorganisms and Toxins

2 Materials Processing

3 Electronics

4 Computers

5.1 Telecommunications

5.2 Information Security

6 Sensors and Lasers

7 Navigation and Avionics

8 Marine

9 Aerospace and Propulsion

EXPORT CONTROL REFORM

The final point I want to discuss is Export Control Reform which will tie all of this together. A few years ago, State, Defense, and Commerce decided to amend ITAR and the EAR in a fairly com-

prehensive way. As part of this, both the State Department and the Defense Department reviewed the U.S. Munitions List. They edited it and defined the terms with greater precision. In many cases, they removed items from the Munitions List. That's the good news. The bad news is that for items that were removed from the list, these items have not been decontrolled. Rather, they were sent over to be regulated under the Export Administration Regulations by the Commerce Department and put onto the Commerce Control List. There's a new section of the Commerce Control List called the **600 Series**. That's where these military items have been moved over, under Export Control Reform.

Military items that have been removed from USML have been moved to a new section of the Commerce Control List called the 600 Series. These items have NOT been decontrolled.

Once these items are regulated under the EAR, they're still subject to certain legal requirements: the requirement to obtain export licenses; the prohibition from disclosing controlled technology to foreign nationals; and the prohibition on exporting to proscribed countries. So, the items that are transferred are still subject to many of these restrictions. The bottom line is – if you are hearing that items are removed from the Munitions List under export control reform, this does not mean that they are decontrolled, rather they most likely are still controlled, but under the EAR. A lot of the items that were shifted over under export control reform are low level parts, components, accessories, and attachments. The reason that this is important to you is as follows: If you are developing products and technologies that you wish to develop commercially, you have to check for controls both under ITAR and EAR. The two work together. You need to keep both on your radar screen when planning your legal compliance.

The conclusion now – we're coming to the end – is to go back to our core strategy, the three fundamental steps. You are developing very valuable technologies based on government funding. You're getting ready to roll these out commercially and you are subject to ITAR and EAR. What's your strategy for managing all of this compliance? Here's the answer: (1) Classification – check to see if your items are on the Munitions List and the Commerce Control List, Get your Commodity Jurisdiction Determination; (2) If you are regulated, apply for and obtain export licenses, TAAs and follow the requirements; and (3) If you are regulated, develop your export compliance program.

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